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# In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-761

LOUIS HARRY CHIPPAS,
*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

MILTON E. GRUSMARK
*Attorney for Petitioner*
1720 - 79th Street Causeway, Suite 110
Miami Beach, Florida 33141

MIAMI REVIEW — 371-4853 — 377-3721

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# Supreme Court
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# United States

**OCTOBER TERM, 1973**

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**NO.** _____

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LOUIS HARRY CHIPPAS,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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Petitioner, LOUIS HARRY CHIPPAS, prays that a Writ of Certiorari issue to review the opinion and decision of the United States Court of Appeals for the Fifth Circuit entered on April 27, 1973, and denied on June 20, 1973.

## OPINIONS BELOW

The opinion and decision of the Court of Appeals is not yet reported. A copy of the decision is attached hereto as Appendix "A". A copy of the order denying petition for rehearing is attached as Appendix "B". The order entered by the Court of Appeals granting stay of mandate is attached as Appendix "C". Petitioner's out of time petition for rehearing was denied by the Fifth Circuit Court of Appeals on September 12, 1973. A copy of the order is attached as Appendix "D". Petitioner's request for leave to file out of time suggestions for rehearing was denied on November 7, 1973. A copy of the order is attached as Appendix "E".

## JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit, which is sought to be reviewed, was entered on April 27, 1973. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

The decisions of the Appellate Court affirmed adjudication of guilt and sentence entered by the United States District Court for the Southern District of Florida.

## QUESTIONS PRESENTED

I.

WHETHER THE ACCUSED WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL, DUE PROCESS OF LAW, AND TO THE CONFRONTATION OF WITNESSES AGAINST HIM WHEN THE HUB OF THE CASE CONCERNS THE ACTIVITIES OF A GOVERNMENT INFORMER WHO IS NOT BROUGHT TO COURT FOR CROSS-EXAMINATION.

II.

WHETHER THE EXCLUSION OF CERTAIN GROUPS FROM THE JURY LIST DEPRIVED DEFENDANT OF HIS RIGHT TO A TRIAL BY JURY, IN VIOLATION OF 28 UNITED STATES CODE, SECTION 1862, AND THE SIXTH AMENDMENT OF THE UNITED STATES.[1]

III.

WHETHER THE ADMISSION INTO EVIDENCE OF MARIJUANA IS A DENIAL OF DUE PROCESS WHERE THERE IS NO PROOF THAT THE MARIJUANA WAS EVER IN THE POSSESSION OF OR UNDER THE CONTROL OF PETITIONER, AND THERE IS A MISSING LINK IN THE CHAIN OF CUSTODY OF THE MARIJUANA.

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[1]This question is raised with full recognition of this court's denial of certiorari in the case of *Crews v. United States*, Case No: 72-6021 ..... U.S. ....., order entered March 26, 1973.

## IV.

WHETHER THE SENTENCE IMPOSED BY THE TRIAL COURT MUST BE VACATED, SINCE THE COURT CONSIDERED A CONSTITUTIONALLY INVALID CONVICTION OBTAINED WITHOUT THE BENEFIT OF COUNSEL.

### CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES

The following constitutional provisions are involved:

#### Amendment V

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

#### Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an . . .

impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

The following federal statutes are involved:

**Title 28 U.S.C., Section 1861**

"It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose."

**Title 28 U.S.C., Section 1862**

"No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status."

**Title 28 U.S.C., Section 1254(1)**

> "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

## STATEMENT OF THE CASE

On May 17, 1972, Agent John Stevenson of the Bureau of Narcotics and Dangerous Drugs, went with an informant working for the Bureau, to meet CHIPPAS.

Agent Stevenson, on the stand, testified to the following:

An informant, Juan Ortiz, together with CHIPPAS, and a Co-Defendant named ROBERT D'ORSAY, left Agent Stevenson and went alone to a nearby coffee shop. (Tr. 75). The next day, May 18, 1972, Stevenson observed CHIPPAS and Ortiz looking at various aircraft. He took photographs which were introduced into evidence at the trial. On May 23, 1972, Stevenson met with Ortiz and D'Orsay at the Miami Airways Motel Coffee Shop. (Tr. 84). At that meeting O'Orsay was introduced to Stevenson as a co-pilot. There was discussion of landing at Great Inagua and then Jamaica. A Lockheed Lodestar plane was selected. (Tr. 85). There was discussion about the capability of the plane holding the "load of marijuana" and conversation about a landing place in Leesburg, Florida. (Tr. 85). Further discussion took place according to Stevenson, concerning communication and the fact that emergencies might take place, that D'Orsay would be on the ground and that Ortiz and Stevenson would be on the plane. (Tr. 87). He stated that there

was no way to contact CHIPPAS, (Tr. 90), but that CHIPPAS would call Stuart Levine. Stuart Levine was a third co-Defendant at the trial. On Wednesday, May 24, 1972, Stevenson, Ortiz, and D'Orsay and Stuart Levine met at the coffee shop. (Tr. 125). Stevenson was introduced as John the co-pilot. It was the first time he had ever met Levine. Stevenson testified that D'Orsay had said that CHIPPAS called and that they were expected in Kingston around one o'clock that afternoon. (Tr. 127).

On the 25th Stevenson and Ortiz went to Jamaica. At that time he had a conversation with CHIPPAS. (Tr. 136). He said that CHIPPAS had political connections in Jamaica, and that he could load an airplane right there at the airport. Stevenson also said that CHIPPAS had arranged an acceptable price for the marijuana. (Tr. 139). He said CHIPPAS then checked into a room at a nearby hotel and said that he had paid Twenty-Five Hundred Dollars to a Jamaican political figure for protection of the deal. (Tr. 141). Stevenson also said that CHIPPAS stated that he used Stuart Levine's name in Miami to hold stocks and other things. (Tr. 144). He said that some ten thousand pounds could be picked up at a later date. There was conversation about other further possible deals. Later a man named Burke came to the hotel room and discussed loading the plane. (Tr. 152). There was further discussion about using a truck and getting the marijuana in the hills. (Tr. 155). Thereafter, about three-thirty in the morning, Stevenson and Ortiz were at the airport.

About 4:00 A.M. on the 26th, Jamaican police, under Deputy Superintendent Jacobs, and BNDD agents, set up surveillance at the Kingston International Airport.

(Tr. 314-315, 226-227). Jacobs and Agent Logay watched the yellow Lodestar and Stevenson and Ortiz who were waiting there. (Tr. 315-316). Constable Steward and Corporal Francis "laid in ambush" on an airport approach road. (Tr. 294). They were looking for a "tipper-body" truck. (Tr. 294).

Constable Steward and Corporal Francis testified: A dump truck came on the airport approach road about 5:15 A. M., (Tr. 295, 342). The truck stopped next to a light colored Plymouth Valiant. (Tr. 298, 342). The occupants of the two vehicles talked with each other. (Tr. 297-298). The Valiant drove on towards the airport and the dump truck pulled off the road. (Tr. 299, 247). Corporal Francis identified the passenger in the Valiant as being the defendant CHIPPAS. (Tr. 342-347).

Deputy Superintendent Jacobs and Agent Logay testified that shortly after they got the radio message from Steward about the dump truck and light colored Valiant, they saw a light colored Valiant pass them at the airplane. (Tr. 316-217, 227-238). Jacobs identified the passenger as being the defendant CHIPPAS, and the driver as Elden Sirjue. (Tr. 317, 324). This was about 5:30 A. M. Jacobs then went to where Steward had seized the dump truck. (Tr. 321-322).

Agent Logay testified that shortly after the Valiant drove by CHIPPAS and an Indian walked towards the plane. (Tr. 228-229). The Jamaican police came out from hiding and arrested CHIPPAS and the Indian, who was Elden Sirjue. (Tr. 230, 324).

CHIPPAS was then arrested by the Jamaican authorities. (Tr. 159). A few minutes after CHIPPAS was arrested, Constable Steward and Deputy Superintendent Jacobs arrived at the airplane with the dump truck. (Tr. 301-302). Steward and Jacobs each testified that the dump truck was loaded with 27 large, full, burlap bags and that two burlap bags were loaded on the aircraft. (Tr. 295, 299-301, 322).

Stevenson then told Ortiz to make a phone call to D'Orsay in Miami to say that they were leaving from Kingston to Miami. Stevenson flew on a commercial plane at about nine-thirty that evening to Miami from Jamaica. Stevenson and other agents landed at Leesburg in a plane he and the other agents had boarded in Miami. He had two bags of marijuana with him in the plane, which had been given him by the Jamaican Constabulary force. (Tr. 167). He saw D'Orsay at the airport and arrested him.

Agent Logay also testified concerning conversation with CHIPPAS in Jamaica. He was present at the time CHIPPAS was arrested. His testimony in no way adds to what has been stated above.

None of the other witnesses who testified presented any evidence at variance with the foregoing statements.

Neither Stevenson nor Logay was on the plane that supposedly carried the two bags from Jamaica to Florida. Each of them flew from Jamaica; one from Kingston to Miami; and one from Montego Bay to Miami, by a commercial aircraft. There was no testimony concerning the flight from Jamaica to Miami, the specific flight on which Ortiz apparently flew a plane with the two bags to Miami.

The agents flew with Ortiz to Leesburg from Miami and not from Jamaica. There was also a total lack of evidence concerning the custody of the two bags from the time they were loaded on a plane in Jamaica. Thereafter an indictment was returned charging CHIPPAS with violation of Title 21, U.S.C., Sections 952, 841, and 959, as a co-conspirator. He was also charged with importation in violation of Title 21, U.S.C., Section 959, and Title 18, U.S.C., Section 2.

He was only found guilty of the conspiracy charge.

## REASONS FOR GRANTING THE WRIT

This case presents a situation where the District Court and the Court of Appeals have rendered decisions in conflict with constitutional safeguards afforded Petitioner.

The effect of the decisions has been to deprive Petitioner of his constitutional right to be confronted with his accusor and to defend his case through cross-examination of the primary witness against him.

## ARGUMENT

### WHETHER THE ACCUSED WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL, DUE PROCESS OF LAW, AND TO THE CONFRONTATION OF WITNESSES AGAINST HIM WHEN THE HUB OF THE CASE CONCERNS THE ACTIVITIES OF A GOVERNMENT INFORMER WHO IS NOT BROUGHT TO COURT FOR CROSS-EXAMINATION.

The Sixth Amendment of the Constitution of the United States provides for the right of a criminal defendant to be confronted with witnesses against him; cross-examination would then be available. In this case the informer did not merely participate in the matters leading to the identification of the Petitioner, he was in fact the prime participant in the crime alleged. According to the government, he alone imported the marijuana into the United States. CHIPPAS obviously did not since he was in custody in Jamaica. Thus questions are presented:

Did Ortiz in fact bring in the marijuana which was taken from the truck?

Did Ortiz in fact fly the Lodestar alone over Cuba to the United States?

Did Ortiz in fact stop with an unloaded plane and secure marijuana from some other source?

Ortiz' absence made impossible the cross-examination required by the constitution, which could have led to relevant answers. It is obvious that it was the government's place to prove each element of the crime and not the Petitioner's to disprove it. It has always been held that the accused has the absolute right to be confronted with all witnesses against him. The necessity for the right to cross-examine at trial was presented to the Court in **California vs. Green**, —U.S.—, 26 L.Ed.2d 489, 90 Sup. Ct.——.

Certainly under **Roviaro vs. United States**, 353 U.S. 53, 1 L.Ed.2d 639, 77 Sup. Ct. 623, no privilege existed here. Since the name of the informer was known and since he participated fully in the act complained of, there would seem to be no question of the constitutional guarantee of confrontation and right of cross-examination. The frequent reference to Ortiz' activities and absolute participation in the alleged crime should certainly have guaranteed the right of Petitioner to be confronted with Ortiz and the right to cross-examine him. These rights were not afforded.

## II.

## WHETHER THE EXCLUSION OF CERTAIN GROUPS FROM THE JURY LIST DEPRIVED DEFENDANT OF HIS RIGHT TO A TRIAL BY JURY, IN VIOLATION OF 28 UNITED STATES CODE, SECTION 1862, AND THE SIXTH AMENDMENT OF THE UNITED STATES.

In March, 1968, Congress passed the Jury Selection and Service Act of 1968. The Act was designed to create uniformity in the method of selection of jurors for Federal Courts. The ultimate aim of the "Act" is to assure all litigants that potential jurors will be selected at random from a representative cross-section of the community and that all qualified citizens will have the opportunity to be considered for jury service. U.S. Code Congressional and Administrative News 1968 Vol. 2 p. 1792.

The basic source for names were the voting lists in the various districts.

Section 1863 of Title 28 required each judicial division or district to adopt a formal plan for jury selection. The plan was to be promulgated in accordance with the objectives of the "Act".

Section 1863(b)(2) contains the fundamental requirement that either voter registration lists or list of actual voters would be the basic source of names. Provision is made for supplementation of those lists to make the plan comply with the legislative intent.

The plan was approved for the Southern District of Florida, on September 19, 1970.

The original list of names was secured by the Federal Court Clerk in June of 1968. The list which had been prepared a short period prior to that time had been secured from the office of the Supervisor of Registration of Dade County, Florida. The lists have never been updated since that time by the Federal Clerk although the Supervisor of Registration forwards a current list each month to the Dade County, Florida jury commissioner. As a result all persons who become 21 years of age since 1968 were and are totally excluded from consideration for a Federal Grant and Petit Jury.

While young adults may serve on a State jury in Florida, they cannot reach a Federal jury.

In **United States vs. Butera,** 420 F.2d 564 (1st Cir. 1970) the Court in deciding whether young adults constituted a cognizable group in order to establish an inference of discrimination said we cannot:

> " . . . close our eyes to the contemporary national preoccupation with a 'generation gap', which creates an impression that the attitudes of young adults are in some sense distinct from those of older adults. That apparent distinctness is sufficient for us to say that neither class could be excluded from jury pools without some justification."

That court, therefore, declared that young adults, though admittedly ill defined, were a cognizable group.

Additionally, the stressing of the judicial system and trial by jury is an attempt to make young adults conscious of their rights, duties and responsibilities is greatly weakened by our banning them from jury service.

Another prejudicial effect of refusing to bring the list current is that American Citizens of a common national origin, Cuba, are excluded from service on a Federal Jury in the Southern District of Florida.

The Cuban influx has taken place on a mass scale in Florida since 1962. By operation of the Immigration law an almost total exclusion of this group has been created. Federal immigration laws require five years of status as a permanent resident prior to application for citizenship. Residence must be established for some time before permanent status exists. A variable amount of time must elapse before application and securing of citizenship after the five year period of permanent residence has passed.

Since the list presently employed was compiled to the Spring of 1968, the bulk of Cuban residents who have received citizenship have, in fact, been excluded. Only those relatively small numbers of pre-Castro United States citizens would be eligible for jury service.

These new American citizens have a different language and a unique and different cultural background derived from a foreign country. They constitute a necessary ingredient in the creation of a "representative cross section of the community". The rapid increase of this group has created a unique situation. Any plan that was unable to make necessary changes in the method used for selecting jurors would be defective; a plan which was

able to make these changes, but did not, would be in violation of the Act. In effect, the present situation has fostered voter registration lists that comply with the objectives of the Act, but due to the increased number of Cubans attaining their citizenship subsequent to the creation of the master jury wheel, the juries selected from the wheel are improperly constituted.

This court in **Peters vs. Kiff**, decided June 22, 1972, 92 S. Ct. 2163 pointed out that exclusion of a cognizable group from jury service injures not only the defendants, but also members of the excluded class by denying those excluded "the privilege of participating equally . . . in the administration of justice."

The fact that there can be no exclusion because of national origin is covered by law. The fact that young adults are a cognizable group or discernible group is the rule of **United States vs. Butera**, supra.

As this court said in **Peters**, supra:

> "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."

Certainly there is a view of life and a perspective on human events that is missing in the jury room when young adults and persons of Cuban origin are barred.

No representative groups of the population can possibly be present if the group on the lower level of the "generation gap" is totally excluded.

## III.

WHETHER THE ADMISSION INTO EVIDENCE OF MARIJUANA IS A DENIAL OF DUE PROCESS WHERE THERE IS NO PROOF THAT THE MARIJUANA WAS EVER IN THE POSSESSION OF OR UNDER THE CONTROL OF PETITIONER, AND THERE IS A MISSING LINK IN THE CHAIN OF CUSTODY OF THE MARIJUANA.

Two bags containing marijuana were introduced in evidence over the objection of the Defendants. It was the contention of the government that the marijuana had been placed on board a plane in Jamaica and that the marijuana introduced was the same as that transported from Jamaica. Important gaps were left that precluded the admission of that evidence.

The marijuana was never in the possession or control of any Defendant in the case. Concededly Levine and D'Orsay were not present in Jamaica. The evidence concerning CHIPPAS at the airport showed that he was arrested while walking towards the airport in Jamaica. He was arrested for possession of several ounces of marijuana by the Jamaican police. The ounces of mari-

juana for which he was arrested were not in his possession but were found in the trunk of a car he allegedly drove in towards the Jamaican airport.

The Jamaican Police seized many large bags containing what they presumed to be marijuana from a truck near the airport. The truck was not present at the time of CHIPPAS arrest. There was testimony that the car in which CHIPPAS was traveling approached the airport in close proximity to the truck which allegedly contained marijuana. There was further testimony that there was some conversation between the occupants of the car and the truck. There was no proof petitioner had ever had possession of the marijuana later recovered from the truck. CHIPPAS was never viewed driving the truck or even being present in the vehicle. In **Williams v. United States**, 290 F. 2d 451 (9th Cir. 1961), marijuana was found in a refuse can located next to the cafe where Williams worked. No evidence was presented to show that Williams had control, although there was testimony demonstrating knowledge on the part of the appellant of the marijuana trade and a willingness to participate. Additionally there was testimony that Williams was to have placed marijuana inside of a can. The Court found the facts insufficient to establish possession beyond a reasonable doubt. In the case at bar the same lack of possession is present.

Impermissible inferences were permitted at the trial court level. CHIPPAS never had physical possession of the marijuana (if it was marijuana on the truck). An inference of possession would therefore be necessary. Such inference may be permitted where it is shown that a defendant had exclusive control of the contraband although not physical possession. CHIPPAS never had exclusive

control of the bags of marijuana. Here, CHIPPAS never even had indirect control of the bags or the truck.

Even assuming, arguendo, that CHIPPAS had been tied to the marijuana in bulk in Jamaica, an even greater gap exists in the record precluding the admissibility of the two bags of marijuana presented at trial.

Neither Agent Logay or Stevenson, who testified at trial, was in a position to make an identification of the marijuana. Each one told the jury that he had returned to Miami from Jamaica by commercial aircraft. Neither was in a position to state that the bags were the same as those removed from the truck by the Jamaican police. Ortiz alone was in a position to forge the link in the chain of custody. No one could state that the bags left Jamaica and stayed on the plane to Miami. No one could state that the contents were not removed during the flight. No one could state that the plane did not land at any airport other than Miami before its ultimate arrival there, that is, no one present at the trial. No attempt was made by the government to lay the basis for identification of the evidence and the continuity of custody in the absence of Ortiz.

In **Gass v. United States**, 416 F.2d 767 (D.C. Cir. 1969), the court states:

> "Since it had never been shown that the analyses were made from the urine sample taken from the accused we held that '[t]here is missing a necessary link in the chain of identification,' fatal to the conviction."

In note 8 the court wrote:

> "It is generally recognized that tangible objects become admissible in evidence only when proof of their original acquisition and subsequent custody forges their connection with the accused and the criminal offense. **Pinkney v. United States,** 124 U.S. App. D.C. 209, 211, 363 F.2d 696, 698 (1966); **Headen v. United States,** 115 U.S. App. D.C., 81 83, 317 F.2d 145, 147 (1963); **Peden v. United States,** 96 U.S. App. D.C. 27, 29, 223 F.2d 319, 321, cert. denied 359 U.S. 971, 79, S.Ct. 886, 3L.Ed.2nd 838 (1955); **Smith v. United States,** 81 U.S. App. D.C. 296, 157, F.2d 705 (1946). Cases applying this rule almost invariably involve physical evidence taken from the accused for use against him at trial."

In **United States v. Panczko,** 353 F.2d 676 (7th Cir. 1965) defendant was charged with illegal possession of Post Office Department Keys. The keys were introduced into evidence. The keys were received by an officer who gave them to the Chief-Of-Police. Postal inspector Jacobs testified that the keys were in his custody and control for a period of time when he got them from Lieutenant Remkus. There was no testimony as to where or from whom Lieutenant Remkus got the keys. He did not testify. The Court stated:

> "On a re-trial of this case the handling of the keys allegedly thrown away by defendant should be traced by an unbroken chain of evidence."

There is no unbroken chain in the case at bar. Two large bags were placed on an aircraft that was piloted by Ortiz. Ortiz was not present at the trial. He was not able to testify that bags placed on the aircraft were in fact the same ones that were on the aircraft when it landed in Miami. There is a link missing in the chain of custody.

## IV.

WHETHER THE SENTENCE IMPOSED BY THE TRIAL COURT MUST BE VACATED, SINCE THE COURT CONSIDERED A CONSTITUTIONALLY INVALID CONVICTION OBTAINED WITHOUT THE BENEFIT OF COUNSEL.

At Appellant's sentencing proceedings the trial attorney referred to a prior conviction suffered by the Appellant when he was seventeen years old. Counsel never learned that the conviction was constitutionally infirm under **Gideon v. Wainwright**, 83 S.Ct. 792 (1963). The prosecutor referred to that conviction and the Court below considered it in determining the Appellant's sentence. Accordingly, Appellant's sentence must be vacated and his case remanded for resentencing without resort to that conviction. **United States v. Tucker**, 92 S.Ct. 589 (1972); **Beto v. Stacks**, 408 F.2d 313 (5th Cir. 1969); **Lipscomb v. Clark**, 468 F.2d 1321 (5th Cir. 1972).

In **Burgett v. Texas**, 389 U.S. 109 (1967) a state prosecutor used a constitutionally tainted conviction obtained without the assistance of counsel to enhance punishment under a recidivist statute. On certiorari the Supreme

Court reversed, holding that the admission in evidence of the constitutionally infirm conviction was inherently prejudicial and resulted in a further deprivation of the defendant's constitutional rights:

> "To permit a conviction obtained in violation of **Gideon v. Wainwright** to be used against a person either to support guilt or enhance punishment for another offense (see **Greer v. Beto,** 384 U.S. 269, 16 L.Ed. 2d 526, 86 S. Ct. 1447) is to erode the principal of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right."
>
> "The admission of a prior criminal conviction which is constitutionally infirm under the standards of **Gideon v. Wainwright,** is inherently prejudicial and we are unable to say that the instructions to disregard it made the constitutional error "harmless beyond a reasonable doubt' within the meaning of Chapman V. California, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S.Ct. 824."

In **Tucker** a state Court had determined that two of the defendants' convictions were constitutionally infirm but were used to impeach defendants. This Court reversed and remanded for a hearing to determine if, in fact, the sentencing court was relying significantly on the prior invalid convictions to determine the sentence.

In **Lipscomb v. Clark,** supra, the record on appeal consisted only of Lipscomb's uncontradicted allegations

that the prior convictions considered by the Court in sentencing him were obtained in violation of **Gideon.** Nevertheless this Court, Judge Morgan writing for the panel, vacated the sentence and remanded for resentencing, citing **Tucker.**

> "on remand, we feel that the following procedures by the district court would be appropriate. First, the district court should review the records involved in this conviction and determine if, treating the state convictions alleged to have been unconstitutional as void and thus not to be considered in sentencing, the five-year maximum sentence would still be the appropriate sentence based on the records of the trial and petitioner's adjusted conviction record (which would still consist of a twenty-five year sentence on a federal counterfeiting charge). If the district court finds that the maximum sentence would still be appropriate, an order so setting forth would seem sufficient to comply with the requirements of **Tucker.** If, on the other hand, the district court finds that should these prior convictions be proven unconstitutional and void that the maximum sentence would not be appropriate, then it should grant petitioner an evidentiary hearing and allow him to present evidence on his claim that the prior convictions in question were unconstitutional due to **Gideon.** If the district court is convinced of the validity of petitioner's allegations after such a hearing, it may then properly resentence. Such a procedure seemed best designed to fully protect petitioner's rights."

Based on the foregoing facts and authorities, Appellant's sentence should be vacated and remanded to the District Court.

## CONCLUSION

Certainly the most important factual evidence in this case concerns the activities of Juan Ortiz. The government saw fit to permit innuendo concerning those activities rather than put him on the witness stand so that he could be examined by defendants. No fair trial could be afforded under such circumstances. The very importation of marijuana into the United States was done through the act of Juan Ortiz, alone, according to the government's statement, yet no evidence exists from the time the plane left Jamaica until it reached the United States. Without the testimony of the one person allegedly in sole possession of the marijuana during the only period of actual importation into the United States, conviction was improper. Petitioner respectfully suggest the propriety of the issuance of the Writ so that the entire record of this case may be reviewed.

Respectfully submitted,

MILTON E. GRUSMARK
**Attorney for Petitioner**
1720—79th Street Causeway,
Suite 110
Miami Beach, Florida 33141
PHONE: (305) 865-4224

/s/ Milton E. Grusmark

MILTON E. GRUSMARK

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari, was mailed to the Solicitor General, Justice Building, Washington, D. C., this ____ day of January, 1974.

MILTON E. GRUSMARK
**Attorney for Petitioner**
1720—79th Street Causeway,
Suite 110
Miami Beach, Florida 33141
PHONE: (305) 865-4224

/s/ Milton E. Grusmark

MILTON E. GRUSMARK

# APPENDIX

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 72-3367
Summary Calendar*

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

STUART LEVINE, LOUIS HARRY CHIPPAS
and ROBERT D'ORSAY,
Defendants-Appellants.

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Appeal from the United States District Court for the
Southern District of Florida

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(April 27, 1973)

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*Rule 18, 5th Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al*, 5th Cir. 1970, 431 F.2d 409, Part I.

App. 2

Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

PER CURIAM: AFFIRMED.[1] See Local Rule 21.[2]

[1]All three appellants contend that (1) the evidence was insufficient to support their convictions for conspiring to import, possess, and distribute marijuana, (2) two bags of marijuana were admitted against them without proof that appellants possessed the bags and without proof of chain of custody, (3) Cuban immigrants and young adults were systematically excluded from their grand and petit juries, and (4) their convictions resulted from improper "creative activity" by Government agents. Appellants Levine and D'Orsay, attacking their convictions for carrying a firearm during commission of a felony, 15 U.S.C. § 924(c)(2), contend that the Government failed to prove that the firearm was actually used in the commission of the felony. Appellant D'Orsay, who was convicted below of possession of a firearm by a convicted felon in violation of 18 U.S.C. App. § 1202, argues that there was insufficient proof that the gun had moved in interstate commerce.

[2]See NLRB v. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F.2d 966.

## APPENDIX "B"

[TITLE OMITTED]

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion April 27, 1973 ....., 5 Cir., 1973, ..... F.2d .....).

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(June 20, 1973)

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Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

PER CURIAM: The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

## APPENDIX "C"

[TITLE OMITTED]

[Filed July 11, 1973]

Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of Arthur W. Tifford, Esquire, to file appearance as attorney of record for appellant, Louis Harry Chippas, is hereby Granted.

IT IS FURTHER ORDERED that the motion of appellant, Louis Harry Chippas, for permission to file an out-of-time petition for rehearing in the above cause, is hereby Granted.

IT IS FURTHER ORDERED that the motions of appellants, Louis Harry Chippas and Robert D'Orsay, for stay of mandate pending the timely filing and disposition of the petition for writ of certiorari to the United States Supreme Court, are hereby Granted.

## APPENDIX "D"

[TITLE OMITTED]

[Filed September 12, 1973]

Before THORNBERRY and RONEY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition of appellants Stuart Levine and Louis Harry Chippas for reconsideration of the Court's Order striking their out-of-time petition for rehearing, filed in the above styled and numbered cause, is hereby GRANTED:

IT IS FURTHER ORDERED that said out-of-time petitions for rehearing are hereby DENIED.

ON CONSIDERATION OF THE MOTION of appellants Levine and Chippas for recall and stay of judgment issued as mandate in the above numbered and entitled cause, pending an application for a writ of certiorari to the Supreme Court of the United States,

IT IS FURTHER ORDERED that the judgment issued as mandate be recalled and stayed to and including thirty days from the date of this Order, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within said period there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed.

IT IS FURTHER ORDERED that the Clerk shall issue the judgment as mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the above period unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

## APPENDIX "E"

[TITLE OMITTED]

[Filed November 7, 1973]

Before THORNBERRY, GOLDBERG and RONEY,
Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for leave to file out of time suggestions for rehearing en banc on behalf of appellants, Stuart Levine and Louis Harry Chippas, in the above cause is hereby DENIED.

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No. 73-761

FILED
FEB 12 1974

# In the Supreme Court of the United States

OCTOBER TERM, 1973

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LOUIS HARRY CHIPPAR, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-761

LOUIS HARRY CHIPPAS, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that he was denied due process because the government did not call its informant as a witness; that Cuban immigrants and young adults were improperly excluded from the jury; that certain evidence was improperly admitted at trial; and that his sentence was improperly influenced by a prior conviction allegedly invalid under *Gideon* v. *Wainwright*, 372 U.S. 335.

Following a jury trial in the United States District Court for the Southern District of Florida, peti-

tioner was convicted of conspiracy to import, possess, and distribute marijuana, in violation of 21 U.S.C. 846 and 963. He was sentenced to imprisonment for a term of two years, with an additional two years' special parole term. The court of appeals affirmed without opinion (Pet. App. A).

Agent Stevenson of the Bureau of Narcotics and Dangerous Drugs and Juan Ortiz, an informant, were working undercover in the investigation of narcotics traffic by making themselves available as pilots (Tr. 72-73, 84). After having met with co-defendants D'Orsay and Ortiz twice within the previous three days, petitioner, on May 20, 1972, went with Ortiz to the Miami International Airport and looked over some DC-3 and Lockheed Lodestar airplanes (Tr. 79-80). On May 23, 1972, Ortiz and Agent Stevenson met D'Orsay at the airport coffee shop, and after Ortiz introduced Stevenson as his co-pilot on the trip, they discussed in detail the use of a Lockheed Lodestar to transport a load of marijuana from Jamaica to Leesburg, Florida. D'Orsay told Ortiz and Stevenson that petitioner would call co-defendant Stuart Levine sometime after 6:30 that evening, and Levine would convey the information through D'Orsay to Ortiz and Stevenson about when and where to go in Jamaica (Tr. 90-91). After that, D'Orsay would get together with Ortiz and Stevenson and give them final instructions and the money to rent the airplane and to pay for gas and expenses (Tr. 91-92).

On May 24, 1972, Ortiz and Stevenson met with D'Orsay and Levine at the same coffee shop. D'Orsay

stated that petitioner had called him that morning and expected Ortiz and Stevenson to fly into Kingston, Jamaica, at 1:00 p.m. to pick up the load (Tr. 125-127). On the way out of the coffee shop, Levine took Ortiz aside for a few minutes. D'Orsay told Stevenson that they would not be able to contact petitioner in Kingston, but that petitioner would recognize them when they arrived, and that if the airplane did not arrive by 6:00 p.m. in Kingston, petitioner would lose the $8,000 or $9,000 down payment that he had made on the load (Tr. 128-129).

Ortiz and Stevenson flew to Kingston that day, but, despite D'Orsay's urging, they did not arrive until about 11:30 p.m. (Tr. 135). On May 25, about 11:30 a.m., they took off and flew over Kingston, making several touch and go landings at the airport so that petitioner might see them (Tr. 135). During these touch and go landings petitioner was observed on the observation deck, waving at the plane and pounding his fist on the railing when it took off (Tr. 223). When the plane finally landed, petitioner went out to meet it (Tr. 136, 226). Petitioner told Stevenson and Ortiz that he had been forced to pay an extra $5,000 to rent an airstrip about 40 miles west of Kingston for an extra night because they had not come in the day before. He said that he had a political connection in Jamaica who had things under control, and that, if given three hours' notice, he could go into the mountains, where the marijuana was hidden in a dumptruck, and bring it down during the daytime for loading at the airstrip (Tr. 137-

138). Petitioner also stated that, although the marijuana suppliers had tried to raise the price, he was able to negotiate an acceptable price (Tr. 138-139).

Agent Stevenson and Ortiz went with petitioner to his hotel room, where petitioner got in touch with his political connection in Jamaica, to whom he had paid $2,500 for protection (Tr. 140-142). Petitioner stated that the political connection had arranged for them to get a very high grade of marijuana (Tr. 142). The political connection and an Indian man joined them around 4:00 p.m., and arrangements were made to load the marijuana at the Kingston International Airport at 4:00 a.m. the next day, May 26, 1972 (Tr. 152-154). Petitioner and the Indian planned to bring the dumptruck full of marijuana down from the mountains for the loading (Tr. 154-155).

The next morning at about 5:15 a.m., Jamaican police staked out around the airport observed a dumptruck loaded with burlap bags heading toward the airport (Tr. 294-296). A light colored Plymouth Valiant with petitioner and the Indian in it were observed stopping next to the truck and conversing with its occupants (Tr. 297-298, 316-317, 342-343, 346-347). The Valiant turned around and headed back toward the airport (Tr. 298). The truck was then seized by Jamaican police. It was carrying twenty-seven burlap bags, including two which were found to contain marijuana (Tr. 299-302, 322, 330, 334-335, 338). The trunk of the car petitioner was riding in was also found to contain marijuana (Tr. 317-320).

After arriving at the airport, petitioner was arrested as he walked toward the waiting airplane (Tr. 159, 230).

1. Petitioner's contentions that the government's failure to call its informant as a witness violated due process, and that Cuban immigrants and young adults were improperly excluded from the jury, were fully answered in our memorandum in opposition in the companion case of *D'Orsay* v. *United States*, No. 73-5288, certiorari denied, December 3, 1973, upon which we rely here. See, also, our memorandum in opposition on the jury issue in *Crews* v. *United States*, No. 72-6021, certiorari denied, 411 U.S. 908.[1]

2. Petitioner contends that the trial court committed reversible error by allowing into evidence the two burlap bags containing marijuana which were taken from the dumptruck in Jamaica. He rests this contention on the ground that he was never shown to be in physical possession of or have exclusive control over the bags of marijuana, and that the government did not establish chain of custody of the bags. The contention is without merit. Petitioner was not convicted of actual possession, importation, or distribution of marijuana, but rather of conspiracy to possess, import, and distribute marijuana.

The bags of marijuana were admissible because they were being transported in the dumptruck by

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[1] Petitioner's counsel was also D'Orsay's counsel, so he already has a copy of our memorandum in *D'Orsay*. We are, however, providing him with a copy of our *Crews* memorandum.

unindicted co-conspirators pursuant to the conspiracy in which petitioner was shown to have participated. See *United States* v. *Conrad*, 448 F. 2d 271, 276 (C.A. 9). Moreover, the facts were sufficient to show that petitioner had constructive possession of the marijuana. He stated that he and an Indian would go into the mountains, get the dumptruck with the marijuana, and bring it to the airport at 4:00 a.m. At about 5:00 a.m. he and the Indian were seen in a car accompanying the dumptruck toward the airport. They stopped their car next to the dumptruck and spoke with the occupants. These facts were sufficient to show petitioner's constructive possession of the marijuana. See *Quiles* v. *United States*, 344 F. 2d 490, 492-493 (C.A. 9), certiorari denied, 382 U.S. 992.

The chain of custody of the two bags of marijuana was adequately established. They were taken off the dumptruck and placed on the yellow Lodestar airplane in Jamaica by Agent Logay (Tr. 231). The airplane was flown to Montego Bay, Jamaica, with Ortiz and Agent Stevenson aboard (Tr. 206). Ortiz flew the airplane to Opa Locka, where it was met by Agent Stevenson (Tr. 206-207, 232). The airplane then proceeded to Leesburg, Florida, where co-defendant D'Orsay met the airplane and was arrested. Petitioner contends that the bags of marijuana could have been tampered with while Ortiz flew from Montego Bay to Miami. This was most unlikely, since Ortiz was working for the government, and both Agent Logay and Agent Stevenson identified the bags

of marijuana as the ones they put on the airplane in Jamaica (Tr. 167-168, 231-232). Cf. *West* v. *United States*, 359 F. 2d 50, 55 (C.A. 8), certiorari denied, 385 U.S. 867. There was clearly no abuse of discretion in admitting the bags of marijuana into evidence.

4. Petitioner contends that, in sentencing him, the trial court considered a prior conviction allegedly invalid under *Gideon*, *supra*. He raised this issue for the first time in an out-of-time petition for rehearing before the court of appeals, which was denied (Pet. App. D). In contrast to the situation in *United States* v. *Tucker*, 404 U.S. 443, and *Lipscomb* v. *Clark*, 468 F. 2d 1321 (C.A. 5), this issue was not raised in the trial court, nor was it timely raised in the court below, and no factual record has been developed with respect to petitioner's contention. Petitioner's remedy, if any, lies in a motion under Rule 35 for correction or reduction of sentence by the district court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

FEBRUARY 1974.

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